SJA BHD & ANOR

v.

HLB NOMINEES (TEMPATAN) SDN BHD (NO 2)

HIGH COURT MALAYA, PULAU PINANG
SU GEOK YIAM JC
[ORIGINATING SUMMONS NO: 24-1259-2002]
14 OCTOBER 2002

COMPANY LAW: *Meetings - Extraordinary general meeting - Application for enlargement of time - Whether court could exercise discretionary powers to enlarge time - Whether justiciable to do so - Companies Act 1965, s. 355(4)*

CIVIL PROCEDURE: *Time - Extension of time - Application for - Failure to comply with s. 144(3) of the Companies Act 1965 - Whether court should exercise discretionary powers to enlarge time - Whether justiciable to do so - Companies Act 1965, s. 144(3)*

COMPANY LAW: *Meetings - Notice - Notice null and void due to irregularity - Whether court could exercise discretionary powers to validate notice - Companies Act 1965, s. 355(3)*

This was the defendant's application pursuant to s. 355(4) of the Companies Act 1965 ('the Act') for enlargement of time to hold an extraordinary general meeting ('EGM') after the expiration of the time limit prescribed in s. 144(3) of the Act. The defendant also prayed for an order that the defendant's solicitor's notice ('the notice') dated 9 July 2002 of the EGM to be held on 7 August 2002 be declared valid and effective.

Held:

[1] Although s. 144(3) of the Act has expressly made it mandatory for the EGM to be held before the expiration of three months from the date of the deposit of the relevant requisition, since the directors did not proceed to convene the EGM within the period of 21 days as stipulated in the subsection and the delay and failure of the plaintiffs to supply a copy of the share register to the defendant resulted in the defendant's inability to comply with the time limit stipulated in s. 144(3) of the Act, the court could exercise the judicial discretion conferred upon it by s. 355(4) of the Act, and enlarge the time prescribed for holding the EGM upon being satisfied that the justice of the case required as such. The court could further exercise the discretionary powers conferred upon it by s. 355(3) of the Act to validate the notice which the court had ruled to be null and

void due to the irregularity in the date of the holding of the EGM, to wit, 7 August 2002, which was outside the three months period by about two weeks. (p 602 b-d & g)

[Application allowed.]

Legislation referred to:
Companies Act 1965, ss. 144(1), (3), 160(3), 355(3), (4)

For the plaintiffs - Dato' Mahinder Singh Dulku; M/s Mahinder Singh Dulku & Co

For the defendant - Mohd Ariff Yusof; M/s Cheang & Ariff

Reported by Suresh Nathan

JUDGMENT

Su Geok Yiam JC:

This is an application *vide* a summons in chambers (encl. 7) filed by the defendant on 31 July 2002 together with a certificate of urgency (encl. 8) pursuant to s. 355(4) of the Companies Act 1965 ("the Act") for enlargement of time to hold an extraordinary general meeting ("EGM") outside the time limit prescribed in s. 144(3) of the Act.

The defendant also prayed for an order that the defendant's solicitors' notice dated 9 July 2002 of the EGM to be held on 7 August 2002 ("the notice") be declared valid and effective, that the interim injunction granted on 29 July 2002 be set aside and such further or other orders, directions or relief as the court may deem fit and just.

The grounds of the application are that in view of the ruling of the court on s. 144(3) of the Act there has been an irregularity in the proceedings undertaken by the defendant. Notwithstanding the above no injustice has been caused to the plaintiffs, any member or creditor of the 1st plaintiff and the court is not precluded from exercising its jurisdiction to enlarge the time for doing any act or taking any proceedings allowed or limited under the Act pursuant to s. 355(4) of the Act and the defendant applies for jurisdiction to be exercised in the interests of justice in this instance. Further particulars of the grounds are stated in the defendant's supporting affidavit (encl. 6) affirmed on 30 July 2002 by Lee Weng Swee, a manager of the Remedial Management Department of Hong Leong Bank Berhad, the principal of the defendant.

The chronology of events leading to the filing of this application are set out in detail in my grounds of judgment in respect of an application by the plaintiffs (encl. 2), to declare the notice null and void and of no effect and, *inter alia*,

for an interim injunction to restrain the defendant from holding the EGM on 7 August 2002. I shall state them, briefly, here.

The 1st plaintiff is a public limited company. The 2nd plaintiff is the corporate as well as the managing director of the 1st plaintiff. The defendant is a private limited company. It is also a nominee for a group of shareholders of the 1st plaintiff.

On 22 April 2002, the defendant deposited with the 1st plaintiff a requisition for an EGM together with special notice of intended resolutions to remove a number of named directors of the company including the 2nd plaintiff and to appoint two named persons as independent and non-executive directors at the requisitioned EGM pursuant to s. 144(1) of the Act. Twenty-one days passed without the directors of the 1st plaintiff proceeding to take steps to convene the EGM as requisitioned.

Upon the default by the directors of the 1st plaintiff to act upon the requisition the defendant, pursuant to s. 144(3) of the Act, the defendant immediately took steps to convene the EGM by writing to the share registrars of the 1st plaintiff to request for a copy of the shareholders' list.

However, due to the long delay and, ultimately, total failure and refusal on the part of the 1st plaintiff to instruct the share registrars of the 1st plaintiff to supply a copy of the 1st plaintiff's shareholders' list to the defendant, it was only on 9 July 2002 that the defendant's solicitors were able to and did issue a notice of an EGM to be held on 7 August 2002. On 24 July 2002 which is two days after the expiration of the three months period prescribed in s. 144(3) of the Act for the holding of the EGM by the defendant, the plaintiff filed an application (encl. 2) to restrain the defendant from holding the meeting on 7 August 2002 on the ground that the defendant was out of time to hold the EGM under s. 144(3) of the Act.

On 29th July 2002 the court heard submissions from the learned counsels of both parties and ruled in favour of the plaintiffs. The court granted an interim injunction to restrain the defendant from holding the EGM on 7 August 2002 and also declared the defendant's solicitors' notice dated 9 July 2002 null and void and of no effect. On 29 July 2002 the defendant filed this application for enlargement of time to hold the EGM on 7 August 2002 and for validation of the notice calling for the EGM.

On 5 August 2002, the court granted order-in-terms of this application with costs to be borne by the defendant.

My reasons for doing so are as follows:

Although s. 144(3) of the Companies Act 1965 ("the Act") has expressly made it mandatory for the EGM to be held before the expiration of three months from the date of the deposit of the relevant requisition, in this case on 22 April 2002, since the directors did not proceed to convene the EGM within the period of 21 days as stipulated in the subsection and there has been not only considerable delay on the part of the plaintiffs but a total failure on the part of the plaintiffs to consent to the supplying of a copy of the share register to the defendant which delay and failure have resulted in the inability of the defendant to comply with the time limit stipulated in s. 144(3) of the Act, the court can, in exercise of the judicial discretion conferred upon it by s. 355(4) of the Act, enlarge the time prescribed for holding the EGM upon application by the defendant and upon being satisfied that the justice of the case requires that the defendant's application for enlargement of time be allowed. The court can do this even though the application is made after the period of three months which is stipulated in s. 144(3) of the Act for the holding of the EGM has lapsed because of the clear wording used by the legislature in s. 355(4) of the Act.

Section 355(4) of the Act provides as follows:

> 355(4) **The court** (whether the company is in the process of being wound up or not) **may enlarge or abridge any time for doing any act or taking any proceeding** allowed or limited by this Act upon such terms (if any) as the justice of the case may require **and any such enlargement may be ordered although the application for the same is not made until after the time originally allowed or limited.** (Emphasis added)

In my judgment, having allowed the defendant's application for enlargement of time to hold the EGM on 7 August 2002 the court can further exercise the discretionary powers conferred upon it by s. 355(3) of the Act to validate the notice which the court had on 29 July 2002 ruled to be null and void and of no effect because of the irregularity in the date of the holding of the EGM, to wit, 7 August 2002, which is outside the three months period by about two weeks.

The plaintiffs have maintained that they were at all times ready and willing to supply to the defendant a copy of the share register upon payment being made in advance of a sum of RM3,000 pursuant to s. 160(3) of the Act and they have relied on a letter to this effect dated 3 June 2002, exhibited as "TCH1" in the plaintiff's affidavit-in-reply affirmed on 29 July 2002, encl. (5). Nevertheless, the court is satisfied, based on the defendant's supporting affidavit,

affirmed by the said Lee Weng Swee and the numerous letters exhibited therein, that the inability of the defendant to convene the EGM on or before 22 July 2002, which is the last date for the holding of the EGM is caused or substantially contributed to by the plaintiffs' obstructive and hindering acts in wilfully withholding from the defendant a copy of the share register when the defendant was at all times ready and willing to pay the requisite costs in order to obtain it. The court can reasonably infer from the background of this application in particular the conduct of the plaintiffs, that the sole intention of the plaintiffs in delaying and, ultimately, failing and refusing to consent to the supply by their share registrars of a copy of the share register to the defendant is to frustrate the intention of the defendant to convene the requisitioned EGM because of the stated objects of the proposed EGM. Although the plaintiffs are correct when they say that the law as set out in s. 160(3) of the Act requires the defendant to pay in advance the costs of supplying to the defendant a copy of the share register the court found as a fact that neither the plaintiffs nor the share registrars of the plaintiffs notified the defendant of this.

Since the court had on 29 July 2002 given liberty to the defendants to make a formal application for enlargement of time pursuant to s. 355(4) of the Act for the holding of the EGM pursuant to s. 144(3) of the Act and for the setting aside of the interim injunction to restrain the holding of the EGM on 7 August 2002, the issue of *res judicata* does not arise.

The court is also not satisfied despite the plaintiffs' statements to the contrary in the plaintiffs' affidavit-in-reply (encl. 10) affirmed by the 2nd plaintiff on 2 August 2002 that the plaintiffs will suffer substantial prejudice or injustice if the application for enlargement of time and validation of the notice is granted to the defendant. This is because the plaintiffs were under a statutory duty to convene and should have themselves convened the EGM after they received the requisition which was deposited with them by the defendant. The court is not satisfied that the defendant's object of convening the EGM which is to seek resolutions to remove a number of existing directors including the 2nd plaintiff and to appoint two new directors is oppressive and motivated by personal considerations of the defendant or the defendant's principal nor that the reasons advanced by the plaintiffs as constituting substantial injustice have any merits because the object of the EGM and the resolutions sought to be passed at the EGM are within the rights of the defendant and the members of the 1st plaintiff. The court is, consequently, of the opinion that the EGM scheduled for 7 August 2002 should be allowed to proceed and it is for the members to decide at the EGM whether the resolutions should or should not be passed.

The court is further satisfied that the justice of this case requires the court to grant the enlargement of time pursuant to s. 355(4) of the Act and validation

of the notice pursuant to s. 355(3) of the Act since a considerable amount of time, effort and expense have been expended by the defendant to convene the EGM on 7 August 2002 including the locating of a suitable venue for the EGM because the 1st plaintiff has more than 6,000 members.

It is also because of this reason that the court was not minded to grant an Erinford injunction upon the oral application of the learned counsel for the plaintiffs pending appeal to the Court of Appeal.